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No. ____

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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION,

Petitioner,

v.

BETSY Y. JUSTUS, in her official capacity as Secretary of the North Carolina Department of Revenue,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

DOES A FRANCHISE TAX VIOLATE THE FOURTEENTH AMENDMENT WHEN IT TAXES GROSS RECEIPTS OF INVESTOR-OWNED, AND ELECTRIC COOPERATIVE, POWER COMPANIES ARISING FROM FURNISHING ELECTRIC SERVICE, BUT DOES NOT TAX SALES OF STOCK BY INVESTOR-OWNED POWER COMPANIES?

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STATEMENT OF THE CASE

North Carolina levies a franchise tax upon the "gross receipts" of "every person" engaged in the "business of furnishing electricity." N.C.G.S. § 105-116. The franchise tax is imposed for the privilege of exercising business as a corporation, and "depends upon the amount of business transacted by the corporation," *Worth v. Petersburg R.R.*, 89 N.C. 301, 306 (1883); N.C.G.S. § 105-114. N.C.G.S. § 105-116 applies to investor-owned, for profit power companies as well as to electric cooperative, non-profit corporations, furnishing electricity. The stated measure of the tax, the tax rate, enumerated statutory deductions and reporting requirements, are identical for both types of power companies.

As a cooperative, Four County Electric Membership Corporation ("Four County" and "petitioner") and its member/patrons have agreed that from sums received in payment of electric bills, it will allocate upon its records a portion of a customer's payment as "patronage capital." Patronage capital is composed of total revenues received by Four County from monthly billings to its members for electric service, less related operating expenses arising from furnishing such electricity, including interest payments upon any debt capital used in providing electric service as well as depreciation upon operating facilities and equipment.

Four County's bylaws provide that "at the moment of receipt" part of a member's payment for electric service becomes patronage capital. They permit the cooperative, "at its discretion," to "retire" patronage capital if a member dies, "provided, however, that the financial condition of the Cooperative will not be impaired." In addition, Four County "strives" to return patronage capital to its living members upon a 20-year rotation "as long as it is economically sound to do so."

In the proceedings below, the North Carolina courts have refused to permit Four County to deduct from its gross receipts franchise tax liability either the patronage capital it accrues upon its books, or the patronage capital it eventually refunds to its members.

NO SPECIAL OR IMPORTANT GROUNDS EXIST JUSTIFYING ALLOWANCE OF THE WRIT.

Four County has not established compelling reasons for issuance of the extraordinary Writ requested by it. In recognition of the inherent powers possessed by a sovereign with respect to both the objects and methods of taxation, the Court has traditionally been reluctant to interfere with a state's taxing system. The failure of the North Carolina Legislature to provide a specific deduction for patronage capital in the arena of franchise taxes,

and the refusal of the courts below to judicially engraft such a preference, are quintessential local matters. Four County's North Carolina franchise tax responsibilities lack national significance, and implicate no federal policies or programs. Petitioner has been evenly taxed in comparison with others similarly situated. Any further recourse by it must be through an appeal to the General Assembly of North Carolina for statutory amendments, and not for the issuance by this Court of its discretionary Writ.

A FRANCHISE TAX DOES NOT VIOLATE THE FOURTEENTH AMENDMENT WHEN IT TAXES GROSS RECEIPTS OF INVESTOR-OWNED, AND ELECTRIC COOPERATIVE, POWER COMPANIES ARISING FROM FURNISHING ELECTRIC SERVICE, BUT DOES NOT TAX SALES OF STOCK BY INVESTOR-OWNED POWER COMPANIES.

The lower court's application of N.C.G.S. § 105-116 to petitioner was unquestionably correct under the laws of North Carolina. While the court's rationale speaks for itself, it apparently was struck by the discretionary elements which surround the creation of patronage capital and its possible return to Four County's members. The uncontroverted facts disclose that at all times petitioner reserves the unfettered right not to retire patronage capital if such would impair the company's financial circumstances. Consequently, the court was unable to conclude that patronage capital might constitute some form of a deduction for a tax measured by gross receipts.

North Carolina now joins Oregon in disallowing the deductibility of patronage capital. *Lane Electric Cooperative v. Department of Revenue*, 307 Or. 226, 765 P.2d 1237 (1988). *Alabama v. Pea River Electric Cooperative*, 434 So.2d 785 (Ala. Civ. App. 1983), referenced by petitioner, is distinguishable upon its face, and rests upon Alabama administrative determinations

and local statutes. *Pea River* has no constitutional underpinnings. There the relevant state statute required that electric cooperatives "shall" return patronage capital to their members. North Carolina possesses no similar statute.

The decision of the Court of Appeals withstands any scrutiny under the United States Constitution. Like treatment of all persons similarly situated is all that is required by the equal protection clause of the Fourteenth Amendment. *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248 (1930). The "Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

Petitioner's reference to the tax-exempt consequences of selling stock, for franchise tax purposes, is without constitutional significance. This activity is not taxed by N.C.G.S. § 105-116 regardless of the person who performs it. As an incidence of its voluntary formation, a non-profit corporation in North Carolina may "neither authorize nor issue shares of stock." N.C.G.S. § 55A-28(a). The Fourteenth Amendment is simply not implicated by Four County's challenge to an exemption granted for acts it does not commit, and exercised by others dissimilarly situated as for-profit entities. Four County had been free to form itself as a for-profit corporation and avail itself of any benefits to be derived from selling equity shares. Having elected not to do so, it presents no constitutional question to the Court.

CONCLUSION

Whether patronage capital is deductible for franchise tax purposes, or not, is a question without vitality beyond North Carolina. The issue intrudes upon no federal policies, and pos-

sesses no independent significance. The case below does not warrant the exercise of the Court's extraordinary and discretionary jurisdiction. For these reasons, the Court should decline to issue the Writ requested.

Respectfully submitted,

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